TERRORISM AND HUMAN RIGHTS: CURRENT CHALLENGES

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I INTRODUCTION

In the Security Council debate soon after 9/11, Britain's envoy to the UN Sir Jeremy Greenstock offered the delegates a definition of "terrorism" which had never been given before: it has the merit of being terse and expressive, as close to reality as one can get. Greenstock had said:

> "What looks, smells and kills like terrorism – is terrorism."

It is this terrorism – that "looks, smells and kills" that has been responsible for chilling the vitals of criminal justice systems around the free world.

India experienced terrorism long before the West did, long before 9/11. And we had put in place anti-terrorist laws that were harsh and repressive, in the nineteen-eighties and nineteen-nineties we first had the TADA Acts (Terrorist Anti Disruptive Activities Acts of 1984, 1985 and 1987 – they were challenged in Court as unconstitutional but the challenges were repelled. I had criticized the judgment of a Bench decision of 7 Justices in *Kartar Singh* v. *State of Punjab*[1]. One of the advantages of being President of the Bar Association of India is that you are privileged to write the President's Page in the BAI Journal. In the "Indian Advocate" No: XXV this is what I wrote:

> "The conclusions of the majority upholding the constitutionality of TADA brings to mind the warning of an American Judge (Justice Frankfurter) the same Judge whose advice had been sought when drafting Article 21: the life and liberty Article in our Constitution. He had said: "Don't rely on Judges and the Courts to save your freedoms". He knew that Judges (and lawyers) were masters of the written word, they could rationalize (and so legitimize) the most tyrannical laws: our Judges have done it before-in *ADM Jabalpur*; they have now done it again-in *Kartar Singh*. But under our Constitution, we must rely on our Judges to save our freedoms. No one else will. So, dear colleagues, my advice to you all is to stimulate public opinion and by robust disputation, strive to remove, by the established processes of law, this blot on an otherwise unblemished record of the Supreme Court of India in the field of Human Rights."

Fortunately after a few years, public opinion, stirred by the mal-administered repressive laws, prevailed, not immediately but ultimately. TADA was replaced by POTA (Prevention of Terrorism Act) in the year 2002 and POTA (like the earlier TADA) was frequently mis-used, not by the centre, but by the detaining and prosecuting authorities in many of the states. And India lives in the states. Sure enough, then, in March 2004, when it was time for the general elections, the election manifesto of a group of political parties now forming the government at the Centre pledged to the electors that the repressive law would be repealed. And POTA was repealed – as soon as the new Government was sworn in. In the past two years and more, the "terrorist"

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1 (1994) 3 SCC 569.

in India is tried under the normal processes of the criminal law. And we have survived – though not without some difficulty!

In the West it appears that they are not so sure of survival. Citizens of countries that have ratified the UN Torture Convention, even erstwhile human rights protagonists – have recently begun to speak of the "unthinkable". About mild forms of "oppression" and "forced persuasion" in terrorist related cases.

Compromises with long established principles of criminal jurisprudence are now being offered in the 'war on global terrorism' (as it is wrongly called). In Delhi last week, Lord Kinnock the Chairman of the British Council, (addressing the Hindustan Times Leadership Summit), said that "terrorism" should not be glorified by associating it with "war", because people then tend to regard terrorists as some form of "war-riors", which they are not!

II The Position in England and in the US

But the stress is beginning to be felt in the free world. In December 2005, England's House of Lords handed down a land-mark decision: or so it seemed on a casual reading of the head note in the law reports. A special bench of Seven Law Lords[2] considered the all important question as to whether evidence obtained abroad by torturing a human being could be admitted by a tribunal for continuing his detention without trial in the UK. All seven Law Lords said (in separate speeches) that torture was one of the most evil of evil practices, and that it was completely unacceptable; some of them even recalled, with a sense of national pride, that after the year 1640 the Privy Council had never issued a "torture warrant"!

But in law (as in life) the devil is in the detail.

Lord Bingham, (with whom Lord Nicholls and Lord Hoffman concurred) said that the Special Immigration Appeals Commission (SIAC) – the tribunal set up by law to scrutinise the certificate issued by the Secretary of State (the authority empowered to detain persons for indefinite periods) must refuse to admit evidence obtained from abroad where it was unable to conclude that the evidence had not been obtained by torture: "Great", I said to myself when I read the speech of Tom Bingham (he and a succession of England's Chiefs have visited India several times: England has been fortunate in its Chief Justices – Bingham, Harry Woolf and now Lord Philips – each endowed with robust commonsense).

> "Not so great" I said when I read the rest of speeches: four of the Law Lords (who made up the majority on the seven Judge Bench)[3] – differing from Bingham – said – that if the tribunal (SIAC) was left in any doubt as to whether the evidence was or was not obtained by torture then it could admit it, and so justify the detention.

The consequence of adopting this approach was greatly regretted by the Senior Law Lord: at the end of his judgment he said that it would "undermine the practical efficacy of the Torture Convention and deny detainees the standard of fairness to which they are entitled under the European Convention." And Lord Nicholls characterised the majority opinion as only "paying lip service" to the professed principle that British Courts would not admit evidence procured by torture! But the law of the land is what a majority of the Judges

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2 *A* v. *Secretary of State of Home* (2005 3 WLR 1249)

3 Lord Hope, Lord Rodgers, Lord Brown and Lord Carswell.

say it is. The four Law Lords who now make up the majority in the December 2005 decision have sent forth a clear signal to the Executive that they will not be seen giving a significant set back to the Secretary of State's efforts to combat terrorism.

In another great common law country – the United States – the situation is a trifle worse. Harvard Law Prof. Alan Dershowitz has publicly suggested that US Courts should look at the possibility of using "torture warrants": a practice given up in England three hundred years ago![4]

And Judge Richard Posner has just written a book[5] published by the Oxford University Press, in which he says that the US Constitution has changed significantly since September 11 to sanction all of the Bush administration's counter-terrorism measures: including coercive interrogation, incommunicado detentions, warrant less wiretappings, and ethnic profilings. Posner is a distinguished Judge on the US Court of Appeals of the Seventh Circuit and one of the most prolific legal scholars of his generation. People listen to what he writes and says. He now says that the world's oldest Constitution (that of the United States) is a flexible document; that al-Qaeda poses the gravest possible threat to security and therefore Courts in the US must defer to the political branch on the "balance" to be struck.

Posner's book was reviewed in the (New York Times Review) two weeks ago on November 16, 2006 – the reviewer (David Cole) says (and I quote)"whether judges today are willing to stand up for principle against power has become one of the most urgent questions facing our nation."[6] David Cole believes that "Judges today" are not quite the same as the judges of yesterday!

A year after 9/11, in November 2002, President Aahron Barak of the Israeli Supreme Court in a spirited speech had said that "it is the fate of democracy that not all means are acceptable to it, not all methods employed by its enemies are open to it; a democracy must fight with one hand tied behind its back"[7]. But that was four years ago – four long years that have witnessed recurrent and savage terrorist attacks on innocent civilians. Let us face it. More and more Judges in the common-law world – are now attempting to extricate themselves from that one-hand-tied-behind-the back-syndrome.

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4 In 1628 one John Felton assassinated the Duke of Buckingham Lord High Admiral of England. He was pressed to reveal the names of his accomplices: the great question was whether the laws of England justified the Executive in putting Felton "to the rack". Charles I an intimate friend of the Duke said that before this was done "let the advice of the Judges be had..." So the Judges were consulted. They assembled in Serjeant's Inn in Fleet Street and agreed unanimously that Felton ought not to be tortured by the rack because no such punishment was known or allowed by our law: this historical anecdote was quoted by Lord Nicholls in his speech in *A* v. *Home Secretary* 2005 3 WLR 1245 at page 1288. Lord Hoffman recalled same anecdote saying that many years after the event Blackstone had recorded the decision of the judges who assembled in Sergeant's Inn in the following words: "That word honour, (Lord Hoffman said) the deep note which Blackstone strikes twice in one sentence, is what underlies the legal technicalities of this appeal. The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it".

5 Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, Oxford University Press (2006). See also Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, New Haven, Yale University Press (2006); he proposes that the President of the US be given short–term emergency powers that will reassure the public and help forestall a second terrorist attack, while sharply limiting the period of the emergency in order to preserve civil liberties for the long term.

6 David Cole argues that many of the short-cuts suggested to prevent terrorists gaining the upper-hand "actually helps the terrorists and makes us more vulnerable because of the backlash they create": see his article Are we safer? NEW YORK REVIEW, March 9 (2006).

7 116 HARV L REV 148 (2002).

III Reforms in the Criminal Justice System to meet with the Terrorist Menace

When suggesting reforms in the criminal justice system, to meet the terrorist menace we must suggest something which remains anchored in the Rule of Law, a concept which we all – all in the Common-law world – profess to uphold. To do this we also need to look at some old concepts more closely.

Take for instance the basic premise of our criminal law – that no man or woman can be guilty of a crime unless so proved beyond reasonable doubt – the "reasonable doubt standard" is rooted in all common law jurisdictions. But it is a standard that defies measurement; it is often approximated to between 80 percent to 90 percent certainty: never 100 percent. The late Prof. Wigmore in his classic treatise on Evidence – in discussing various attempts by courts to define how convinced one must be to be "convinced beyond a reasonable doubt" wrote: [8]

> "the truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be as yet no successful method of communicating intelligibly a sound method of self-analysis for one's belief. And yet the choice of the standard of proof does make a difference."

And in 1970, long before terrorism frightened the wits out of the US criminal justice system, Justice Harlan of the US Supreme Court had soberly explained as to how a reasonable-doubt-burden was so designed as to ensure that erroneous judgments will more often set guilty defendants free, than send innocent defendants to prison![9]

The social harm of imprisoning an innocent defendant on a false charge of say theft, or robbery, is great. And yet the social harm of setting free such a thief or robber (for want of evidence acceptable in a Court of law) may not have quite the same impact as setting at liberty a terrorist (who kills) because there is not enough proof of his guilt, only strong suspicion. If the presumption of innocence is to be rationalised in this world of rights and wrongs, should not the prosecutor's burden of persuasion be shaped by the seriousness of the crime?

IV Balancing the Rights of the Individual with the Needs of Society

In recent times, Courts in the United Kingdom and even the European Court of Human Rights have said that legislation for prevention of terrorism may have to be regarded in some special way: that interference with certain freedoms may perhaps be more readily justified in the case of terrorism than in the case of other offences. In the year 2000, the House of Lords in *Kebileni* Case[10] said that a balance had to be struck between the "rights of the individual and the "needs of society". More recently, Courts in England have also said that

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8 Wigmore, *Law on Evidence* (3rd ed.) 325 (1940).

9 In a separate but concurring judgment in the matter of *Samuel Winship* 397 US 358, 25 L.Ed. 2d. 368 (December 1970).

10 *R & R.* v. *DPP* ex parte Kebileni 2000 (2) Appeal Cases 326

in decisions in criminal cases we must take care – to "give importance to what is at stake (but) see that the rights of the defence are fully respected"[11]

Although principles basic to the rule of law – the presumption of innocence, importance of a fair trial and guaranteeing the rights of individual accused – do remain constant, in all situations including terrorist-related ones, the question is whether the rule of law can be accommodated to take into account "the importance of what is at stake" whilst maintaining "the basic rights of the defence" This is the great conundrum that faces the civilised world, post 9/11. And we haven't yet found rational answers, commensurate with our concerns for human rights. At present there is far too much tension in the rule of law as applied to terrorist related offences.[12]

There is a perception in the public mind that in terrorist – related offences the dice is loaded against the prosecuting agencies, in favour of the accused. This perception of reasonable people – people who also believe in the presumption of innocence, the need for a fair trial etc – cannot be just wished away or ignored. Victims of acts of terrorism are not to be treated as mere victims of some tortuous action and given ex–post facto benefits evolved by legal regimes in the form of "socialisation of risks". Social guarantees for the benefits of victims are simply not enough.

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[11] In December 2000, in *Brown* v. *Stott* – 2001 (2) ALL E.R. 17 P.C. in an appeal from the High Court of Justiciary of Scotland - when considering the use of admission in evidence by the prosecution of a statement compelled under a provision in the Road Traffic Act 1988 – the Privy Council said that although it infringed the right against self-incrimination (in Article 6 of the European Convention) – the admission could be used, there being a clear public interest in the enforcement of road traffic legislation. England's Senior Law Lord, Lord Bingham, expressing the unanimous opinion of the Privy Council, said that the relevant provision under which the statement of the defendant was compelled did not represent a "disproportionate response" to the serious problem of high incidence of death and injury on the roads caused by the misuse of motor vehicles. There was need therefore to maintain a fair balance between the general interest of the community and the personal right of the individual.

[12] For instance "standards" derived from domestic criminal procedures may be inappropriate for wholesale transplant into international tribunals. Such "standards' must recognise the special factual and legal burdens inherent in international prosecution. Tribunal designers can best address these burdens through targeted procedural departures from domestic norms: such as in the controversial 1995 decision in *Prosecutor* v. *Tadic* which permitted witness anonymity; an evidentiary request by the prosecutor in this first ICTY trial compelled a panel of three Judges to determine whether witness anonymity was consistent with the defendant's right to a fair trial. The ICTY had indicted Tadic on 132 counts of crimes against humanity and war crimes and as the prosecution assembled its case it became evident that several witnesses were unwilling to testify in open Court. The prosecutor then applied to the trial chamber for protective measures for six prosecution witnesses identified only as witnesses F, G, H, I, J and K. The defence objected to several of the measures, including full anonymity for certain of the witnesses. However in a 2:1 decision the panel mandated anonymity for witnesses G, H, J, and K and allowed most of the other protective measures. Writing for the majority, Judges Gabrielle Kirk McDonald of the United States and Lal Chand Vohrah of Malaysia found that the statutory rules implicitly permitted witness anonymity - whilst conceding that witness anonymity was an extraordinary measure in traditional domestic criminal trials and could impede accurate fact-finding, and that Tadic was entitled to receive "a fair and public hearing", the majority noted that standards drafted "for ordinary criminal and civil adjudications" were not appropriate for the "horrific" crimes and ongoing conflicts in the former Yugoslavia. In a strong dissent Judge Ninian Stephen of Australia argued that witness anonymity went too far and was inconsistent with the defendant's rights. He warned that denying defendants the procedural protections afforded by "international standards" could lead to gross violations of defendants' rights and a corresponding decline in the effectiveness and credibility of the ICTY.

V Right to Silence

For some time now I have advocated – that in terrorist related offences the right of the accused to remain silent during the trial (a right given to him under many – if not most - criminal justice systems) is often a refuge – a refuge for the guilty. It should give way but only at the discretion of the trial Court – in the larger interests of society and in the interest of victims that are affected by dastardly criminal acts.[13]

I do believe that it is time that we recognise that the right to silence during a criminal trial is not really a right but a privilege. Although every accused has a right to be presumed innocent till proven guilty, in terrorist related and other grave crimes the accused has an obligation to assist in the discovery of the truth. The accused, like any other witness knowing the facts, must tell the Court what he or she knows. Adverse inferences to be drawn from his or her failure to give evidence may not be enough; because this might well conflict with the presumption of innocence; there must be a positive obligation imposed by law on an accused person to assist in the investigation, and if so required by the Court to give evidence. Let me emphasize that the requirement should not be that of the prosecutor but of the trial Judge, who would consider under what circumstances and in what cases the accused needs to step into the witness box and give his or her version of the facts and events.

I believe that this would not transgress, but would further the purposes of the law and of justice. I also believe that this would not be a disproportionate response to the growing menace of terrorism.

VI Conclusion

Early this year in the New York Times (of 25 March 2006), England's Home Secretary, (Charles Clarke), was reported as saying that under the adversarial system of justice, convictions were notoriously difficult to secure in terrorist trials. He said he would support a shift to an inquisitorial system in terrorist cases, because it offered protection to the public: in France (he said), magistrates interrogate suspects before their lawyers are brought in. But the Home Secretary then added – almost as an afterthought – (and I quote) "nobody wants to give up the judicial system that has served the English-speaking peoples so well for more than a hundred years: but we have never faced such a menace before, *and we may have to make an exception for terrorism.*" [Emphasis added.]

What that exception is has to be worked out separately by each nation-state.

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[13] In his memoirs ("Life Sentence" published in 1995) Lord Hartley Shawcross, for many years Britains Attorney-General and Chief Prosecutor at the Nuremberg Trials recalls the evidence he gave to a Commission of Inquiry set up in Quebec, Canada, to study the administration of law. This is what he says in his autobiography: "During evidence that extended over two days I told the Commission that I favoured the French procedure of *juge d'instruction* who conducts a preliminary examination of witnesses, including the accused, whose answers then form part of the evidence in the case. In 1968 the crime figure in England were already alarming enough. I said then that we were losing the war against crime. I urged strongly, as I continue to urge, that a defendant's right not to testify at his trial should be abolished. 'Silence', I remarked, 'is the refuge of the guilty... an innocent man will speak out as soon as he has the opportunity.' Meanwhile it is inevitable, however reprehensible, that some police officers will try to bolster the evidence against men who they believe and often know for certain are guilty, but against whom the evidence admissible under our rules is insufficient. It is a peculiarly Anglo-Saxon doctrine – the English philosophy seems to fall over backwards to protect the accused. In England judges are more or less umpires enforcing the rules of the game after which they throw it to the jury and ask 'Howzat?' The French *juge d'instruction* on the other hand is more like a scientist, probing for the real truth."